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In the Supreme Court of the United States

KEITH SMITH, Warden,

Petitioner,

v.

MAURICE A. MASON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR THE PETITIONER

In spite of Respondent Maurice A. Mason's efforts to portray the Warden's petition as a request for mere error correction, Brief in Opposition ("Opp.") at 4, this case is worthy of certiorari for two reasons. First, far from straightforwardly applying *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny, Opp. at 4, the Sixth Circuit set unreasonably high standards for the mitigation performance of trial counsel. Second, and no less important, this case is yet another example of the Sixth Circuit's disregard for the principles of comity and federalism that the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") protects. The appeals court rejected the Ohio courts' objectively reasonable resolution of Mason's claim of ineffective assistance at mitigation and instead substituted its own analysis of how *Strickland* should apply to these facts.

The Sixth Circuit's lack of deference to the reasoned strategic decisions of Mason's trial counsel is a far cry from the *Strickland* precept that counsel's strategic decisions "are virtually unchallengeable" if made after sufficient investigation of relevant law and facts. 466 U.S. at 690. It is true that counsel's strategic decisions are not entitled to this deference if they are unsupported by reasonable investigation. See *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). But the Sixth Circuit's opinion extends well beyond that principle to require counsel to continue investigating, even after selecting a reasonable mitigation strategy (supported by reasonable investigation) that renders additional investigation superfluous. In doing so, the Sixth Circuit essentially requires counsel to use valuable time and resources to continue investigating, apparently for the purpose of either

verifying or undermining a reasonable strategic decision that is already entitled to great deference. Mason's arguments that the Sixth Circuit has not imposed any such requirement hinge entirely on his incorrect conclusion that trial counsel did not investigate sufficiently before selecting a mitigation strategy in this case.

Moreover, as in *Smith v. Spisak*, 512 F.3d 852 (6th Cir. 2008), *cert. granted*, 2009 U.S. Lexis 1536 (Feb. 23, 2009), and other recent decisions, the Sixth Circuit has once again disregarded AEDPA's mandate to defer to state courts' reasonable resolution of claims. Instead, the Sixth Circuit improperly rejected the Ohio courts' resolution of Mason's ineffective assistance at mitigation claim and conducted an independent analysis of *Strickland*'s application to these facts.

The Court should grant review and reverse the Sixth Circuit's opinion ordering the issuance of a conditional writ. Alternatively, the Court should hold this petition pending its decision in *Spisak*.

A. In misapplying *Strickland* and its progeny, the Sixth Circuit established a new rule that trial counsel cannot limit a mitigation investigation in accord with a reasonable strategic decision.

1. Trial counsel had sufficient information to support his choice of mitigation strategy and his decision to abandon further background investigation.

Mason's trial counsel conducted sufficient investigation—even if it was not comprehensive—to

support his strategic decision, which means that his decision is entitled to great deference. When a habeas petitioner alleges that his trial counsel's mitigation strategy was not supported by sufficient investigation, this Court "focus[es] on whether the investigation supporting counsel's decision not to introduce mitigating evidence of . . . background *was itself reasonable*." *Wiggins*, 539 U.S. at 523. A strategic decision made after incomplete investigation is "reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 691. But, like all other strategic decisions, courts "apply[] a heavy measure of deference" to counsel's decision not to investigate. *Id.*; see *Rompilla v. Beard*, 545 U.S. 374, 381 (2005).

Counsel reasonably investigated Mason's background before selecting a mitigation strategy. As detailed in the Warden's petition, counsel was aware of each potentially significant aspect of Mason's family background before he decided on a strategy and discontinued investigation, with the sole exception that counsel may not have known of Mason's father's involvement with prostitution. Petition for Certiorari ("Pet.") at 15-19.

Mason argues that the Warden's focus on the information known and not known to trial counsel at the time of his strategic decision improperly conflates the two prongs of *Strickland*, Opp. at 18-19, but the Warden's argument is based purely on *Strickland*'s first prong. This Court has long made clear that counsel's strategic decisions "are virtually unchallengeable" if "made after thorough investigation of law and facts relevant to plausible

options." *Strickland*, 466 U.S. at 690. To determine whether a strategic decision is unchallengeable, a court must therefore consider what counsel knew at the time of the decision. Here the Sixth Circuit found that trial counsel's mitigation investigation was inadequate without identifying any significant evidence about which counsel was unaware. See App. 52a (Boggs, C.J., dissenting).

Counsel knew enough about Mason's background to identify potential mitigation avenues, and "there was a reasonable basis for his strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty." *Burger v. Kemp*, 483 U.S. 776, 795 (1987). Accordingly, his "decision not to mount an all-out investigation into petitioner's background in search of mitigation circumstances was supported by reasonable professional judgment." *Id.* at 794. Counsel's termination of investigation was the product not of "procrastination and inattention," as Mason suggests, Opp. at 3, but rather of reasoned strategic judgment.

2. Trial counsel's mitigation strategy was objectively reasonable.

The Sixth Circuit afforded no deference to trial counsel's objectively reasonable mitigation strategy, let alone a strong presumption of reasonableness. Mason contends that this lack of deference was appropriate because counsel had not conducted sufficient investigation before selecting a strategy, Opp. at 15-16, but that argument fails for the reasons explained above. Instead, the relevant question is whether, in light of the investigation conducted, counsel's decision to reject a particular

mitigation strategy—and his corresponding decision to forgo additional investigation—was reasonable. Because that decision was reasonable, it is entitled to substantial deference.

This Court has recognized at least two reasons why trial counsel might reasonably choose a mitigation strategy that avoids introducing evidence of a defendant's "troubled family background": (1) when the evidence in question is "by no means uniformly helpful" to the defendant, and (2) where counsel reasonably "concluded that cross-examination might well have revealed matters of historical fact that would have harmed his client's chances for a life sentence." *Burger*, 483 U.S. at 792-93. Moreover, this Court has specifically recognized that it can be sound strategy to withhold potentially mitigating evidence to prevent the introduction of damaging rebuttal evidence. *Darden v. Wainwright*, 477 U.S. 168, 186-87 (1986). In other words, as long as counsel adopts this mitigation strategy after carefully weighing the benefits of mitigating evidence against the risks of possible rebuttal evidence, the strategy is presumed to be reasonable.

Mason's trial counsel selected an objectively reasonable mitigation strategy in the face of a significant dilemma. He knew the prosecution wanted to introduce evidence of Mason's criminal history and past drug use. More important, he was particularly concerned about the prosecution's evidence that Mason had raped and threatened a young woman "similar aged to the victim of this case" only "three or four months before this alleged incident." J.A. 1711. Counsel also knew that Ohio law permits a prosecutor "to rebut mitigation

evidence offered by the defendant where the prosecutor has a good faith basis for believing that such evidence is false," *Ohio v. DePew*, 528 N.E.2d 542, 554 (Ohio 1988), and he reasonably believed the trial judge had a "hair trigger" approach to allowing rebuttal evidence, J.A. 1737. Thus, even though counsel's mitigation investigation had revealed that Mason's background might be useful in mitigation, counsel had to decide whether the benefits of that evidence outweighed the risk of opening the door to highly damaging rebuttal evidence.

In choosing a mitigation strategy, counsel considered not only the mitigating evidence of family background he had already uncovered at the time, but also all potential family background evidence that further investigation might uncover. In other words, counsel recognized in his balancing that a variable existed on the mitigating side of the equation. But he concluded that, whatever the unknown variable was, it could not be great enough to overcome the other side of the equation—the earlier rape. Counsel believed the evidence of Mason's prior rape was damning enough that he wanted to prevent it from getting to the jury at all costs. Believing "the rebuttal [was] stronger than any mitigation" he would get out of Mason's background or Dr. Spare's testimony, counsel decided the risks outweighed the benefits and selected a mitigation strategy that did not involve Mason's background. J.A. 1736.

This reasonable strategic decision is entitled to great deference even if there was only a reasonable *possibility* that presenting evidence of Mason's background would allow the prosecutor to

introduce evidence of Mason's prior rape. Counsel was not obligated to risk an adverse evidentiary ruling on that issue in hopes of reversal on appeal. See App. 57a (Boggs, C.J., dissenting). And, here, counsel reasonably believed that the trial court would allow the State's rebuttal evidence.

Counsel also undoubtedly knew that evidence of Mason's background could cut both ways. Any attempt to portray sympathetically Mason's long history of drug use, drug dealing, running away, and criminal activity would almost certainly have been met with the state's alternative portrayal. Moreover, as Chief Judge Boggs noted in his dissent, "it is entirely possible that, had defense counsel pursued a mitigation strategy that relied on extensively describing Mason's character and background, one of the family members might accidentally have commented in some way on Mason's criminal history, which would have opened the door to the disastrous rebuttal evidence even under the [Sixth Circuit's] reading of *DePew*." *Id.*

3. The Sixth Circuit opinion places counsel in the untenable position of having to continue investigating even after selecting a reasonable mitigation strategy that obviates the need for further investigation.

As the Warden's petition explains, the Sixth Circuit's decision raises the *Strickland* bar for counsel's mitigation performance to an unprecedented level. Pet. at 25. Counsel would have to devote significant time and resources to mitigation investigation even when they know they will not be able to use the fruits of the investigation. Here,

counsel conducted a reasonable mitigation investigation into Mason's family background before making a strategic decision to avoid presenting evidence of family background in mitigation. Counsel reasonably decided not to expend further time and resources investigating aspects of Mason's life that would never be introduced at sentencing. But the Sixth Circuit has now established a new requirement that counsel must continue to investigate a mitigation area even after selecting a reasonable strategy that would not include the evidence.

By requiring counsel to continue investigating potential mitigating evidence that has been rendered moot by a reasonable strategic decision, the Sixth Circuit limits the degree of deference afforded by *Strickland*. Essentially, the Sixth Circuit is calling for counsel to investigate further simply to confirm the correctness of a chosen strategy. This ideal, however laudable, is impracticable. More to the point, this standard far exceeds *Strickland*'s relatively low bar for effective assistance of counsel. See 466 U.S. at 689.

B. The Sixth Circuit again has disregarded AEDPA's mandate of deference to state courts by rejecting both the Ohio courts' reasonable resolution of Mason's claim and their interpretation of Ohio law.

The Sixth Circuit has once again ignored AEDPA's mandate that federal habeas courts afford great deference to state court judgments. The Ohio courts properly identified the law of ineffective assistance and applied that law when evaluating Mason's claim. Even if the Ohio courts' ineffective

assistance analysis were wrong—and it was not—AEDPA permits federal habeas relief only if the analysis was objectively *unreasonable*. See 28 U.S.C. § 2254(d)(1). The Sixth Circuit did not demonstrate objective unreasonableness; it simply declined to defer to the Ohio courts' reasonable findings.

Mason erroneously contends that the state courts' decision was objectively unreasonable because the Ohio Supreme Court misconstrued his ineffective assistance argument. Opp. at 19. According to Mason, the Ohio Supreme Court evaluated only the risk of rebuttal evidence implicated by mitigating evidence of Mason's good character and rehabilitation potential—not the risk of rebuttal evidence implicated by evidence about Mason's family background. But the Ohio Supreme Court correctly understood the scope of Mason's argument, see App. 340a ("Mason argues that his counsel failed to investigate and present a life history of Mason and his psychological background."), and it extended its analysis beyond evidence of good character and rehabilitation potential. The state court specifically concluded that "it was not an unreasonable strategic decision to refrain from presenting the video deposition of psychiatrist Dr. Spare"—which included discussion of Mason's family background—"in order to avoid rebuttal by evidence of Mason's behavioral problems, character deficiencies, and poor potential for rehabilitation." App. 341a.

Because the Ohio Supreme Court did not misconstrue Mason's ineffective assistance claim, the Sixth Circuit should have deferred to the court's broad holding. Instead, the federal court independently evaluated Mason's ineffective

assistance claim for itself. In doing so, the Sixth Circuit misinterpreted Ohio's evidentiary laws governing the admissibility of rebuttal evidence during mitigation. See Pet. at 28-30.

The Sixth Circuit similarly declined to defer to the Ohio Supreme Court's objectively reasonable conclusion that Mason did not suffer actual prejudice as a result of counsel's allegedly deficient performance. App. 45a. On direct review, the Ohio Supreme Court concluded that Mason could not prevail on a claim of ineffective assistance at mitigation because he had failed to establish "a reasonable probability that different tactical choices at the penalty phase would have made a difference in the result." App. 341a (internal quotation and citation omitted). Because counsel's strategy *turned on* avoiding damaging rebuttal evidence, he would never have introduced any family background evidence no matter how much additional investigation he conducted. Accordingly, the Ohio Supreme Court concluded that any alleged failing in counsel's mitigation investigation did not cause prejudice under *Strickland*.

The Sixth Circuit's disagreement with the Ohio Supreme Court's prejudice analysis rests entirely on its disagreement with the Ohio Supreme Court's analysis of Ohio's evidentiary laws. App. 46a. But even if trial counsel and the Ohio Supreme Court were both mistaken in their interpretation of Ohio's evidentiary laws, counsel's concern about avoiding dangerous rebuttal evidence was justified. See *supra* at 6-7. It was therefore objectively reasonable for the Ohio Supreme Court to consider

the specter of rebuttal evidence when analyzing the prejudice prong of *Strickland*.

C. As in *Spisak*, the Sixth Circuit refused to defer to the Ohio courts' reasoned judgment about an ineffective assistance of counsel claim.

Mason contends that there is no reason to hold this case for *Spisak*, 512 F.3d 852, because significant differences exist between the two cases. Opp. at 20-22. Specifically, Mason emphasizes that *Spisak* does not involve a claim of inadequate mitigation investigation. Opp. at 21. But Mason ignores the broader similarities between the two cases.

This case should be held for *Spisak* because the Sixth Circuit repeated here the same errors it made in *Spisak*. In both cases, the Ohio courts properly identified and reasonably applied this Court's clearly established law governing ineffective assistance claims. In both cases, the Sixth Circuit refused to defer to the Ohio courts' reasonable rejection of the petitioners' ineffective assistance claims and instead conducted a de novo evaluation of how *Strickland* applied to the facts. And in both cases, the Sixth Circuit neglected to undertake a proper analysis of whether the Ohio courts' resolutions of the *Strickland* claims were objectively unreasonable. This Court's decision in *Spisak*, then, will likely bear on the Sixth Circuit's deficient analysis here.

CONCLUSION

For the above reasons, the Court should grant the petition for a writ of certiorari. In the alternative, the Court should hold this petition pending its decision in *Spisak*.

Respectfully submitted,

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